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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 117

THE GAS SERVICE COMPANY,
Petitioner,

vs.

OTTO R. COBURN, on Behalf of Himself and All Others Similarly Situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the court of appeals (App.* 20-25) is reported at 389 F.2d 831. The opinion of the district court (App. 8-16) is not reported.

*"App." refers to the single appendix to the Briefs, separately bound.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1968 (App. 20). Petitioner's Petition for Rehearing and Application for Hearing En Banc thereof were denied on March 26, 1968 (App. 26-27). The certiorari jurisdiction of this court is invoked under 28 *U.S.C.* 1254 (1). The petition was filed herein on May 21, 1968 (App. 1)

QUESTION PRESENTED

Whether under *Rule* 23, *Federal Rules of Civil Procedure,* as amended in July, 1966, aggregation of several and distinct claims is now permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 *U.S.C.* §1332, when aggregation was not allowed prior to such amendment?

STATUTE AND RULES INVOLVED

28 *U.S.C.* 1332 provides in pertinent part as follows:

"(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

. . .

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."

Amended *Rule* 23 of the *Federal Rules of Civil Procedure* is set forth in full in Appendix A hereto, pp. A1-A4.

Rule 82 of the *Federal Rules of Civil Procedure*, as amended February 28, 1966, effective July 1, 1966, provides in pertinent part as follows:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein. . . ."

STATEMENT

An appeal was allowed by the court below from an order of the United States District Court for the District of Kansas, overruling petitioner's motion to dismiss a class action. The motion attacked the complaint for insufficiency of the jurisdictional amount required by 28 *U.S.C.* 1332, as amended (App. 5).

Respondent Otto R. Coburn, the only named plaintiff, resides in the vicinity of Arkansas City, Kansas. The petitioner is a Delaware corporation authorized to do business in Kansas. It markets natural gas to residents of the State of Kansas, including respondent Coburn. The complaint alleges that Coburn and other persons exceeding 18,000 in number reside outside of the city limits of various cities in the State of Kansas, and that he and other members of this class have purchased natural gas from petitioner continuously since 1954 (App. 2-3).

Complaint is made that petitioner has individually billed and collected from Coburn and other members of the class an illegal municipal franchise tax in addition to the proper rates payable otherwise. The complaint further alleges that the exact amount of the unlawful charges collected from all members of the class is unknown, but that

the aggregate total of such illegal charges which respondent seeks to recover for the class far exceeds the sum of $10,000 (App. 4-5).

Petitioner moved to dismiss in the district court on the ground that the complaint failed to satisfy the $10,000 jurisdictional amount required by 28 *U.S.C.* 1332. The motion to dismiss was accompanied by an affidavit showing that the total franchise tax collected from respondent Coburn from April, 1964 through February, 1966 amounted to $7.81. At the hearing on petitioner's motion to dismiss, it was stipulated that counsel for respondent were not aware at that time of any member of the class whose individual claim would equal or exceed $10,000 (App. 5, 6, 8, 17).

The trial court issued a memorandum in which it directed that an order be prepared and filed overruling appellant's motion to dismiss (App. 8-16). In its order of June 23, 1967, overruling the motion, the district court authorized an application for an interlocutory appeal under 28 *U.S.C.* 1292(b) (App. 17-18). Timely application therefor was made, leave to appeal was granted by the circuit court on July 26, 1967 (App. 1, 19-20) and notice of appeal was filed on August 1, 1967 (App. 18).

The circuit court, after stating that the claims in issue could not have been aggregated under former *Rule* 23, interpreted the 1966 amendment so as to now permit aggregation, and, accordingly, affirmed the order of the district court overruling petitioner's motion to dismiss (App. 22-23, 25).

The petition for a writ of certiorari to the court below was filed herein on May 21, 1968 and was granted on October 21, 1968 (App. 1).

ARGUMENT

I

The Opinion of the Court Below Holds That Procedural Rules Governing Federal Courts May Modify Their Statutory Jurisdiction Established by Congress

The opinion below sets forth premises which cannot possibly support the result reached, as the following quotations demonstrate:

> "Because the claims of the individuals constituting the class in the case at bar are neither 'joint' nor 'common' this action under Rule 23 before amendment would not have been classified as a 'true' class action and aggregation of claims would not have been permitted." (App. 22-23)

> "It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the $10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value." (App. 23).

> ". . . it follows, under the new rule, that when a cause clearly falls within its terms as a class action, as here, the claims of the entire class are in controversy." (App. 25).

Once it is conceded, as above, that aggregation of the claims here was not permitted under former *Rule* 23, and that the *Rules* cannot enlarge jurisdiction, only verbal alchemy accounts for the result in the Circuit Court. Equally baffling is the Circuit Court's construction of cases deemed relevant to its decision. The lone precedent cited as actual authority for the holding below is *Gibbs* v. *Buck*, 307 U.S. 66, an injunction suit brought under former *Equity Rule* 38 on behalf of members of an unincorporated association

by certain persons and firms, as representatives, all of whom had pecuniary interests involved in excess of the requisite jurisdictional amount. Furthermore, this Court held "They have a common and undivided interest in the matter in controversy in this class suit." 307 *U.S.* 66 at p. 74. No such community of interest is even arguably present in this action.

Since the respondent here and each member of his putative class would have separate contracts with petitioner, giving rise to varying amounts claimed and possibly also to individual set-offs and counterclaims, the only conceivable common element present is a question of law. The court below did not attempt to categorize this action under amended *Rule* 23 nor to characterize its nature for jurisdictional purposes, since it concluded that aggregation of claims of class members is now authorized whenever a class suit is appropriate under the amended rule (App. 25). By this process, several and distinct claims are procedurally converted into the equivalent of a joint or indivisible claim, and both substantive rights and federal jurisdiction are materially affected. The resulting problems and their implications are neither mentioned nor discussed in the opinion below.

We suggest that the decisive question can only be fairly stated and met along the following lines: *Whether federal jurisdiction, founded upon the matter in controversy prescribed by Congress, can be expanded by an interpretation of rules of practice which enlarges the permissible joinder of the number of matters in controversy triable in a particular action?* This unavoidable question, involving the relationship of federal courts and the Congress, was ultimately assumed in the decision below. It is to this unanswered question that we wish to direct attention here.

II

The Rules for Ascertaining Jurisdictional Amount in Federal Diversity Cases Are Independent of the Rules of Practice Adopted for the Federal District Courts

The right of access to the lower federal courts is only such as is provided by Congress.

> ". . . Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. Turner v. Bank of North America, 4 Dall. 8, 10, 1 L.ed 718, 719; United States v. Hudson, 7 Cranch, 32, 3 L.ed. 259; Sheldon v. Sill, 8 How. 441, 448, 12 L.ed. 1147, 1150; Stevenson v. Fain, 195 U.S. 165, 49 L.ed 142, 25 Sup. Ct. Rep. 6. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . ."—*Kline* v. *Burke Construction Co.*, 260 U.S. 226 at 234.

Congress has repeatedly restricted access to the lower federal courts by consistent upward revision of the requisite jurisdictional amounts in both diversity and federal question cases.

> "From the time of the first Judiciary Act, Congress has used the requirement of a minimum amount in controversy as a method of restricting access to the lower federal courts, originally and by removal, in certain types of cases. And successive acts of Congress have progressively increased the requisite jurisdictional amount.
>
> "Originally, diversity and alienage cases could not be brought in the federal courts unless the value of the matter in controversy exceeded $500 exclusive of costs. This amount was raised in 1887 to $2,000 plus, exclusive of interest and costs; by the Judicial

Code of 1911 to $3,000 plus, exclusive of interest and costs; and by the Act of July 25, 1958 the amount in controversy must exceed $10,000 exclusive of interest and costs.

"Jurisdiction over general federal question cases, granted to the federal courts for the first time in 1875, has undergone a similar history with the amount in controversy requirement increasing successively from an original $500 to the present $10,000." *Moore's Federal Practice*, 2nd ed., Vol. I, pp. 817-18.

The obvious Congressional intent has been noted by this Court and has led it to adopt a strict construction of the diversity statute.

". . . From the beginning suits between citizens of different states, or involving federal questions could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount. Cases involving lesser amounts have been left to be dealt with exclusively by state courts, except that judgment of the highest court of a state adjudicating a federal right may be reviewed by this Court. Pursuant to this policy the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount. The policy of the statute calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . ." *Healy* v. *Ratta*, 292 U.S. 263 at pp. 269-70.

This restrictive congressional policy undoubtedly prompted the unchanged[1] stipulation of *Rule* 82 of the

1. "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. *An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391-93.*" *Rule* 82, as amended in 1966. The italicized portions represent additions to original *Rule* 82.

Federal Rules of Civil Procedure that nothing therein would be construed to extend or limit the jurisdiction of the district courts. Apart from the specific disclaimer of *Rule* 82, the rules do not purport to deal with jurisdictional standards. Those statutory standards have given rise to a body of case law wholly distinct from the practice rules in effect from time to time.

That the varying rules of practice must not be confused with jurisdictional boundaries has been the continuous teaching of this Court. In *Oliver et al.* v. *Alexander et al.*, 6 Peters (U.S.) 143, Mr. Justice Storey early considered the effect upon the Court's limited appellate jurisdiction of the admiralty practice permitting joinder of seamen's wage claims in the lower courts.

> ". . . It is well known that every seaman has a right to sue severally for his own wages in the courts of common law; and that a joint action cannot be maintained in such courts by any number of the seamen for wages accruing under the same shipping articles for the same voyage. The reason is that the common law will not tolerate a joint action except by persons who have a joint interest, and upon a joint contract. If the cause of action is several, the suit must be several also. But a different course of practice has prevailed for ages in the Court of Admiralty in regard to suits for seamen's wages. It is a special favor, and a peculiar privilege allowed to them and to them only; and is confined strictly to demands for wages. The reason upon which this privilege is founded is equally wise and humane; it is to save the parties from oppressive costs and expenses, and to enable speedy justice to be administered to all who stand in a similar predicament; in the expressive language of the maritime law, velis levatis. . . . A joint libel may therefore always be filed in the admiralty by all the seamen who claim wages for services rendered on the same voyage, under the same shipping articles. But although the libel is thus in form joint, the contract is always treated in the

admiralty according to the truth of the case, as a several and distinct contract with each seaman. . . . 6 *Peters* (*U.S.*) 145-46.

". . . One seaman cannot appeal from the decree made in regard to the claim of another, for he has no interest in it, and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim; and the matter of dispute between him and the owners, or other respondents, is the sum or value of his own claim, without any reference to the claims of others. It is very clear, therefore, that no seaman can appeal from the District Court to the Circuit Court unless his own claim exceeds fifty dollars; nor from the Circuit Court to the Supreme Court unless his claim exceeds two thousand dollars. And the same rule applies to the owners or other respondents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole the matter in dispute; but they can appeal only in regard to the demand of a seaman which exceeds the sum required by law for that purpose, as a distinct matter in dispute. . . ." 6 *Peters* (*U.S.*) 147-148.

Over one hundred years later, following the adoption of the initial *Federal Rules of Civil Procedure*, the inability of any rule of practice to modify statutory jurisdictional restrictions was as firmly settled as in Mr. Justice Storey's time.

"Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisos or caveats emphasize this restriction. The first is that the court shall not 'abridge, enlarge nor modify substantive rights,' in the guise of regulating procedure. The second is that if the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved. *There are other limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance,*

the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute." *Sibbach* v. *Wilson*, 312 U.S. 1 at p. 10 (Emphasis ours).

The concepts applicable to aggregation of claims for jurisdictional amount purposes have remained singularly constant. They are succinctly set forth in *Pinel* v. *Pinel*, 240 U.S. 594 at 596:

> "The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. Clay v. Field, 138 U.S. 464, 479, 34 L.ed. 1044, 1049, 11 Sup. Ct. Rep. 419; Troy Bank v. G. A. Whitehead & Co., 222 U.S. 39, 56 L.ed 81, 32 Sup. Ct. Rep. 9. . . ."

These concepts were specifically reviewed and re-affirmed by this Court in a class action brought under original *Rule* 23 of the Federal Rules in *Thomson* v. *Gaskill*, 315 U.S. 442 at pp. 446-47:

> "Since the record does not contain the various agreements upon which the plaintiffs' action is founded, there is no basis for determining whether this is a suit 'in which several plaintiffs, having a common undivided interest, unite to enforce a single title or right, and in which it is enough that their interests collectively equal the jurisdictional amount.' Lion Bonding & Surety Co. v. Karatz, 262 US 77, 86, 67 L ed 871, 879, 43 S Ct 480; see Shields v. Thomas, 17 How (US) 3, 5, 15 L.ed 93, 94; Troy Bank v. G. A. Whitehead & Co. 222 US 39, 40, 41 56 L ed 81, 82, 83, 32 S Ct 9; Gibbs v. Buck, 307 US 66, 74, 75, 83 L ed 1111, 1116, 1117, 59 S Ct 725, or one in which 'the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy,'

Davis v. Schwartz, 155 US 631, 647, 39 L ed 289, 296, 15 S Ct 237; see Clay v. Field, 138 US 464, 479, 480, 34 L ed 1044, 1049, 1050, 11 S Ct 419; Russell v. Stansell, 105 US 303, 26 L ed 989. Aggregation of plaintiffs' claims cannot be made merely because the claims are derived from a single instrument, Pinel v. Pinel, 240 US 594, 60 L ed 817, 36 S Ct 416, or because the plaintiffs have a community of interest. Clark v. Paul Gray, Inc. 306 US 583, 83 L ed 1001, 59 S Ct 744. In a diversity litigation the value of the 'matter in controversy' is measured not by the monetary result of determining the principle involved, but by its pecuniary consequence to those involved in the litigation. Wheless v. St. Louis, 180 US 379, 382, 45 L ed 583, 585, 21 S Ct 402; Oliver v. Alexander, 6 Pet (US) 143, 147, 8 L ed 349, 350."

In short, the jurisdictional foundation of every diversity action has heretofore invariably been determined by jurisdictional standards and not by rules of practice, regardless of their convenience to litigants or to the courts.

III

Nothing in Amended Rule 23 Authorizes or Even Suggests an Expansion of Federal Jurisdiction, and the Court Below Erred in Holding to the Contrary

As previously mentioned, neither the original nor amended Rules, including *Rule* 23, purport to deal with federal jurisdiction, except for the disclaimer in *Rule* 82. It is apparent that amended *Rule* 23 has been completely re-written (Appendix A hereto). It is probable that the the categories of "true", "hybrid" and "spurious" class actions will be abandoned under the new rule in favor of "(b) (1)", "(b) (2)", and "(b) (3)" class actions. Of course, it is to be hoped that these new classifications will be more workable and convenient tools for administering federal class suits, whenever jurisdiction is present, but

they have no more bearing upon jurisdiction than any previous rule governing class suits.

It has been suggested that because of the possibility of the more binding effect of adjudications upon class members under the new rule, therefore the matter in controversy is likewise extended and, by reason thereof, so is federal jurisdiction.[2] The fallacy in this suggestion is apparent from a comparison with other rules dealing with joinder of claims and parties. *Rule* 20 authorizes the joinder in one action of parties whose claims are several, if arising out of the same transactions or occurrences when a common question of law or fact will also arise. Intervention upon substantially the same terms is allowed by *Rule* 24(b). We are unable to find even a suggestion that these liberal joinder provisions have enlarged diversity jurisdiction, although they may frequently enlarge the number of matters in controversy permissibly joined in suits thereunder. If these rules were interpreted to allow the aggregation of claims whenever joinder of parties is authorized by them, then the federal district courts would be overwhelmed with litigation and the Congressional restrictions upon their jurisdiction would be swept aside. But, if extension of permissible joinder of claims in controversy is sufficient ground for now aggregating claims under *Rule* 23 for jurisdictional purposes, then the same logic would sanction aggregation under *Rules* 20 and 24. In fact, a stronger case would exist for such aggregation because the latter rules deal with identified parties actually before the court whose controversies will necessarily be conclusively adjudicated by reason of their active participation.

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2. Federal Jurisdiction—Diversity of Citizenship—Jurisdictional Amount in Class Actions, Case Western Law Review, Vol. 19, No. 4, p. 1101. *See also*, Am. Bar Journal, Vol. 54, July, 1968, p. 716, and Professor Wright's commentary at p. 106 of the 1967 pocket part to Vol. 2 of Barron & Holtzoff's Federal Practice & Procedure.

The Fifth and Eighth Circuit Courts of Appeal examined amended *Rule* 23 on essentially similar facts and reached results opposite to that of the court below. *Alvarez* v. *Pan American Life Insurance Co., et al.*, 5 Cir., 375 F.2d 992, *cert. den.* 389 U.S. 827; *Snyder* v. *Harris*, 8 Cir., 390 F.2d 204, Judge Bell surely correctly concluded that ". . . we cannot assume that federal jurisdiction has been expanded in such a *sub silentio* manner." 375 F.2d at 995.

District Judge Frankel's comment[3] on amended *Rule* 23 is also enlightening. Especially pertinent is his remark that:

> ". . . For better or for worse, Congress has exercised its unquestioned power to set a lower financial limit for most areas of federal jurisdiction. Unless there is at least one party entitled to open the door, the federal court remains closed. And there are many, at least, who see this as no tragedy, certainly so far as the diversity jurisdiction is concerned." 43 *F.R.D.* at p. 51.

Respondent here has available to him and to the thousands of members of his class the courts of Kansas which are authorized to entertain class actions[4] and which are undeniably well-equipped to deal with the local questions of Kansas law involved in this cumbersome and time consuming action. We respectfully suggest that Congress intended that this litigation be conducted there and not in our over-burdened federal courts.

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3. *Some Preliminary Observations Concerning Civil Rule 23*, by Marvin E. Frankel, 43 *F.R.D.* 39. Judge Frankel observes that "aggregation" may have been a misnomer. 43 *F.R.D.* at p 48. This is clearly so whenever a joint or undivided right is in issue, since then only a single claim is asserted; regardless of the number of individuals interested in or affected by its assertion. "Aggregation" is, however, appropriately used and permitted whenever a single plaintiff has more than one claim which he combines in an action against a single defendant. *Moore's Federal Practice*, 2nd ed., Vol. I, pp. 882-83.

4. *K.S.A.* 60-223 is the same as former Federal Rule 23.

CONCLUSION

For the foregoing reasons the decision below should be reversed with directions that the motion to dismiss be sustained.

Respectfully submitted,

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APPENDIX A

Rule 23, Federal Rules of Civil Procedure, Amended February 28, 1966, Effective July 1, 1966

Rule 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters.

The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.